
Scott A. Favreau
v.
Division of Insurance
Docket No. E2004-06

Decision and Order

Introduction and Procedural History

By Notice of Claim for an Adjudicatory Proceeding dated January 30, 2004, Scott A. Favreau (“Favreau”) appealed to the Commissioner of Insurance (“Commissioner”) a decision of Division of Insurance (“Division”) staff denying his application for an individual insurance producer’s license. I was designated presiding officer for this proceeding. A Notice of Procedure issued on February 11, scheduling a prehearing conference for March 4 and a hearing for March 18. The Division filed its answer on February 19. Favreau also provided copies of the materials he had submitted to the Division in connection with his license application.

Favreau has represented himself throughout this proceeding; Douglas Hale, Esq. represents the Division. At the prehearing conference, the parties agreed that none of the facts underlying the decision denying Favreau’s license application are disputed. Favreau stated that he wanted to present the testimony of Frank Peraino, president of AllEnergy Gas and Electric Marketing Company (“AllEnergy”), the company for which Favreau formerly worked, to provide additional information about his specific background and circumstances and to explain the reasons why he should be given a producer’s license. The Division stated that it expected to present its case through its written submission, but

reserved its right to offer affidavits from the federal court that were not included in the Division's answer to Favreau's Notice of Claim.

The hearing took place on March 18. Favreau and Peraino both testified. The Division presented no witnesses, and did not seek to offer into evidence additional documents from the federal court.

Background

On or about November 14, 2003, Favreau submitted to the Division an application for a producer's license to sell life, accident and health insurance. He answered affirmatively two questions on the application, one asking if he had ever been convicted of a crime and a second asking if he had ever been a party in any lawsuit or arbitration proceeding involving allegations of fraud, misappropriation or conversion of funds, misrepresentation or breach of fiduciary duty. He attached to his application a two-page explanation of the incident underlying his answers to those questions, as well as three letters of recommendation and a copy of the judgment document issued by the United States District Court. In summary, Favreau's statement and the documents submitted with it show that in December 2001 he pleaded guilty to one count of conspiracy to commit mail fraud, a felony, which occurred in the course of his employment, from some time after August 1993 to October 1995, as a salesperson for American Inventors Corporation and American Institute for Research and Development ("AIC/AIRD"). He was fined \$3,000; ordered to pay a court assessment of \$50; and, together with defendants in related cases, ordered to make restitution payments. He was also sentenced to three years probation, for four months of which he was subject to home detention with electronic monitoring.

On January 5, 2004, the Division's Director of Producer Licensing sent Favreau a letter, denying his license application pursuant to G.L. c. 175, §162R ("§162R"). As reasons for the denial, the letter cited two specific subsections of §162R: 1) (a)(6), which permits denial to a person who has been convicted of a felony, and 2) (a)(8) which permits denial if the applicant has "used fraudulent, coercive or dishonest practices, or demonstrated incompetence, untrustworthiness or financial irresponsibility in the conduct of business." Favreau then filed his Notice of Claim.

The Notice of Claim asks the petitioner to state clearly the facts on which the request for a hearing is based. Favreau wrote that before submitting his license application

he reviewed the details of his conviction with the Division, and was told that his offense was not grounds for automatically denying his application but that decisions were made on a case by case basis. He stated that he had completely satisfied the other requirements for a license, and had submitted letters of recommendation with his application. He asserted that his license was summarily denied and that, while the Division's letter referred to his offense, it gave no specific details as to the basis for the denial. He requested an opportunity to obtain information on the specific deficiencies or concerns about this application, and asked that the Division, after such concerns were addressed, reconsider his application and issue him a producer's license.

Undisputed Facts

Favreau did not dispute the fact of his conviction, or that the acts that underlay the felony prosecution occurred in connection with his employment as a sales representative for AIC/AIRD. At the hearing he stated as well that he is still on probation, which will terminate on December 27, 2004. He confirmed that the documents filed with the Division's answer are those which were submitted with his application.

The Parties' Testimony and Arguments

Favreau stated that his testimony is based on the assumption that the basis for the Division's rejection of his license application was his conviction, and that his appeal arises from his concern that the review process did not consider all of the information about him. He seeks reconsideration of the decision.

In the statement attached to his application, Favreau described his employment as an inside salesperson at AIC/AIRD, who was trained to utilize a specific sales pitch to persuade individuals to pay the company to conduct patent searches and develop marketing reports. He stated that he was instructed not to deviate from the sales pitch because it had been reviewed by the company's attorneys and that any changes from the script could expose the company to liability. Favreau was paid on commission for the sales that he closed. He stated that he realized, when he met with federal investigators, that some things about the sales were misleading and wrong. He considers his experience at AIC/AIRD to be an important learning experience and stated that he now uses that experience to test his words and actions.

At the hearing, Favreau testified about his educational background and described the financial and emotional costs of the federal prosecution on him and his family. He argued that the events that resulted in his guilty plea occurred approximately eight years ago and will not recur. He stated that he is truly sorry for his mistake and that he has not been in any trouble either before or after the incident that resulted in his conviction, and expressed his belief that he is incapable of again getting into a similar situation. He testified that he would undertake no actions that would jeopardize himself or his family.

Describing the criminal prosecution as a “nightmare,” Favreau noted that his testimony helped ensure that the principals in AIC/AIRD were sentenced to jail. He pointed out that he has paid over \$20,000 in restitution to the victims and a \$3,000 fine, as well as a court assessment. Favreau stated that he did not fully understand the effect of his plea on his future job opportunities. He noted that as part of his sentence, he was under house arrest for four months, but was permitted to work at his regular job during that period. No incidents have occurred during his probation.

Favreau also testified that he has an outstanding work record, noting that before his employment at AllEnergy he worked as a salesperson with Newark Electronics for two years, during which time he won a series of monthly milestone awards. He then joined AllEnergy in January 1998, first as a salesperson. In October 2000 he was promoted to the position of regional account manager, where he was responsible for some of the company’s largest accounts. As evidence of his personal qualifications, he referred to a memorandum announcing his promotion and a message from a customer. Favreau argued that his personal characteristics and his post-1995 work history demonstrate that he is qualified for a license, and that the events that led to his guilty plea will not be repeated.

Frank Peraino was, until November 2003, president of AllEnergy, and is now the founder and president of Risk Services Group, Inc. (“Risk Services”), a company that principally provides energy-related products and services to businesses. He confirmed the statements in his letter of recommendation submitted with Favreau’s November 2003 application. Peraino has known Favreau for about six years, since employing him in 1998 to work as a sales representative for AllEnergy. He testified that Favreau informed him in November 2000 that Favreau was under federal investigation for actions taken during his employment at AIC/AIRD. At that time Favreau was one of about 100 AllEnergy sales

employees. Peraino stated that AllEnergy was aware of the need to preserve the company's business reputation and considered at the time whether to retain Favreau. AllEnergy ultimately decided that keeping him as an employee posed no risk to the company and that it would benefit from his continued employment. Peraino's letter of recommendation identified three other grounds for AllEnergy's decision: 1) Favreau was an entry level employee at AIC/AIRD, with little knowledge of its business strategies; 2) he had no prior history of legal problems, and had an impeccable record at AllEnergy; and 3) he was forthright about his problem, and made no excuses for his actions. Peraino noted that AllEnergy never reconsidered its action and never regretted its decision to retain Favreau. He commented in his letter that Favreau pleaded guilty to mail fraud to remove the financial and emotional burden of dealing with the federal prosecution. In his letter of recommendation, Peraino further commented that it might have been more appropriate to consider Favreau as young and naïve rather than charge him with a felony.

Peraino stated that Risk Services now employs Favreau as a contractor and will continue to do so. In addition to providing energy related products, Risk Services seeks to offer a supplemental benefits program to its customers, using products provided by Colonial Life and Accident Insurance Company. Licensing Favreau as an insurance producer will help Risk Services achieve that goal.

On Favreau's behalf, Peraino argued that even though Favreau's conviction would support the literal application of the licensing law, the broad discretion that the law provides carries an obligation to investigate fully and act reasonably on an application such as Favreau's. Peraino asserted that a process that looks only at paper applications does not consider all relevant information on an applicant's trustworthiness. He argued that the concern to be addressed is whether the applicant is likely to engage in unlawful conduct in the future.

Peraino testified that Favreau will continue to sell non-insurance products for Risk Services, commenting that his experience has shown Favreau to have integrity, and to be honest and trustworthy. He noted that he had sufficient faith in Favreau to include him in his new company. Peraino stated that Favreau's conduct showed a lack of judgment in the past, that he did the right thing by pleading guilty, and has paid a price for his plea. He asserted that Favreau, having been once burned, will not repeat the experience that led to

his conviction. He urged that Favreau be evaluated on his merits, and argued that granting him a producer's license is consistent with the spirit of the law.

The Division argued that because the undisputed facts support the decision to deny Favreau's license application, the denial should be upheld. It further asserted that Favreau has the burden of showing that the Division's decision was an abuse of discretion, and that he did not meet that burden. It argued that the director of agent and broker licensing did consider all aspects of Favreau's application, including the letters of recommendation.

Analysis and Discussion

Favreau applied for an insurance producer's license after the effective date of G. L. c. 175, §§162G-162X, the insurance producer licensing statutes. Section §162R (a) permits, but does not require, the Commissioner to refuse to issue a producer's license for one or more of fourteen itemized reasons. Favreau reported in his application that he had been convicted of a felony and attached to his application an explanation of the circumstances relating to the offense and letters of recommendation. The Director of Producer Licensing identified two statutory bases for her denial of Favreau's application: (1) §162R (a)(6), conviction of a felony; and (2) §162R (a)(8), using fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in the commonwealth or elsewhere.

The issue to be decided on appeal is whether the evidence supports the decision of the Director of Producer Licensing to deny Favreau's license application. That denial was based on the undisputed facts that Favreau pleaded guilty to a felony and that the conspiracy to commit mail fraud occurred in the course of a business operation. Further, it is unquestioned that mail fraud is, as set out in the Government's information charging Favreau, a crime involving "false and fraudulent pretenses, representations and promises." The Division did not offer any information about the incident that led to the guilty plea to augment the information contained in Favreau's own statement and the documents attached to his application.

The burden is on Favreau to show that the decision was incorrect. As evidence, he has offered his own testimony and the oral testimony and written recommendation of Frank Peraino. I find Favreau and Peraino to be credible witnesses whose testimony addresses such important issues as the amount of time that has passed without incident

since the event that gave rise to the conviction and Favreau's successful employment in other sales positions during that time. Such factors are appropriately considered in evaluating a candidate for a producer's license. In addition, both before and after his guilty plea, Favreau has worked in sales, even while under house arrest and throughout his probationary period. Peraino's testimony also indicates that Favreau, if licensed, would not be pursuing an independent career in insurance sales but would continue at his current job, with an added qualification that would enable Peraino's new company to broaden the spectrum of services that it offers its business clients.

However, although the events which gave rise to Favreau's conviction took place between 1993 and 1995, the plea occurred in 2001. Favreau testified that he is still on probation, which will not terminate until December 2004. The Division has a longstanding policy of caution in considering license applications submitted by people who are on probation, and when the record shows a relatively short time period between the conviction and the application. *See, e.g., Economou v. Division of Insurance*, E2001-09 (application made approximately two years after conviction, while applicant still on probation); *Pignone, Jr. v. Division of Insurance*, E96-7 (application submitted while applicant on probation for approximately 18 more months). *See, also, McCarthy v. Division of Insurance*, E95-12 (applicant still on probation at time of application.) Accordingly, the Division's denial of Favreau's license application at this time is consistent with those past decisions. The reasoning in those decisions, that the applicant has had a limited time to demonstrate rehabilitation, is equally applicable in this case. Although Favreau has provided evidence of his work record since he left AIC/AIRD, and the person who is both his current and most recent past employer supports his application, neither specifically addressed the issue of rehabilitation. I therefore uphold the Division's decision.

Conclusion

For the above-stated reason, Favreau's appeal is denied.

Dated: May 6, 2004

Jean F. Farrington
Presiding Officer

Pursuant to G.L. c. 26 §7, this decision may be appealed to the Commissioner of Insurance within three days.